Supreme Court, U.S.
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IN THE
Supreme Court of the United States

Michael W. Frierson-Harris,
Petitioner,

v

Joseph C. Hough, Jr , *et al* ,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael W Frierson-Harris, *pro se*
301 Cathedral Parkway
Apartment 6E
New York, NY 10026
(917) 331-1894

QUESTION PRESENTED FOR REVIEW

This Court holds that postdeadline filings are impermissible, with two exceptions: "First . . . any extension of a time limitation must be 'for cause shown.' Second, . . . any *post*deadline [emphasis in original] extension must be 'upon motion made,' and *is permissible only* [emphasis added] where the failure to meet the deadline 'was the result of excusable neglect'" *Lujan v. National Wildlife Federation*, 497 U S 871, at 895-896 (1990). Respondents filed postdeadline answers–ranging from 18 to 189 days late–to Petitioner's second, verified, and amended complaint. No Respondent attempted to file a postdeadline answer "upon motion made" No Respondent attempted to show "cause." Having no "cause shown" or "motion made" before it, the District Court could not find the requisite "excusable neglect" The Second Circuit, in direct and clear conflict with *Lujan*, affirmed the District Court's discretion to accept–*sua sponte*–Respondents' postdeadline answers as filed, following which the Circuit denied a petition for hearing *en banc*.

Question – Whether each Respondent, having failed to file a postdeadline answer "permissible" under *Lujan*, has failed to answer Petitioner's verified complaint

PARTIES

Petitioner is: Michael Wesley Frierson-Harris, a/k/a/ Michael Wesley Harris.

Respondents are: Joseph C. Hough, Jr , L. Robert Batterman; Eugene G. Eisner, Euan K. Cameron; David M Carr, Ana Maria Diáz-Stevens, John A McGuckin; Christopher L. Morse, Ann B Ulanov, Janet R. Walton.

Jointly liable parties to the proceedings below, but non-Respondents in this Court are: David E. Frazer; John F. Fullerton, III, Despatch Moving and Storage Company, Inc ; Nick Zuhusky; and Michael Maloney.

Former parties to the proceedings below, but non-Respondents in this Court are: Andrew Squire (settled with Petitioner); and Randall H. Balmer (voluntarily dismissed by stipulation)

Non-Parties to the Proceedings below, but captioned erroneously in Second Circuit proceedings are: Holland L Hendrix; Rosemary S. Keller (deceased); The Trustees of Columbia University in the City of New York, Mary E MacNamara, Union Theological Seminary; and The Executive Committee of the Board of Trustees (1998 through 2005) of Union Theological Seminary

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OPINIONS BELOW

The Court of Appeals' summary order was not selected for publication, but is reported at *328 Fed Appx 753* (C A 2, 2009) also at 2009 WL 2144364 That Court's order denying a petition for hearing *en banc* is unreported. The District Court's grant of summary judgment to Respondents Eugene G Eisner and L. Robert Batterman is not reported in *F Supp.2d*, but is found at 2007 WL 4547723 (S D N Y). The District Court's grant of summary judgment to Respondents Joseph C Hough, Jr , Euan K Cameron, David M Carr, Ana Maria Diáz-Stevens, John A McGuckin, Christopher L Morse, Ann B Ulanov, and Janet R. Walton is not reported in *F Supp 2d*, but is found at 2007 WL 2428483 (S. D N Y.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U S C. §1254 (1)

The summary order of the court of appeals was entered on 1 July 2009 and amended. non-substantively, on 20 July 2009 (App. B, in App , at 3a-6a) An order denying a timely petition for hearing *en banc* was entered on 1 September 2009 (App. A, in App., at 2a-3a.) The jurisdiction of the District Court was invoked under 42 U.S.C §1981, §1983, and §1985 and under 28 U S.C §1367.

FED. RULES. CIV. PROC. AND SUPREME COURT CASE INVOLVED

Fed. Rules Civ. Proc., Rule 6 (b): Extending Time.

(1) In General When an act may or must be done within a specified time, the court may, for good cause, extend the time·

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires, or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect

(2) Exceptions A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b). (d), and (e), and 60(b), except as those rules allow

Supreme Court Case, in relevant part: *Lujan v National Wildlife Federation*, 497 U.S 871

"**Rule 6(b)** sets out the proper approach in the case of late filings·

> 'When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration

> of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.. '

This provision not only specifically confers the 'discretion' relevant to the present issue, but also provides the mechanism by which that discretion is to be invoked and exercised First, any extension of a time limitation must be 'for cause shown ' Second, although extensions before expiration of the time period may be 'with or without motion or notice,' any *post*deadline [emphasis in original] extension must be 'upon motion made,' and is permissible only where the failure to meet the deadline 'was the result of excusable neglect ' Thus, in order to receive the affidavits here, the District Court would have had to regard the very filing of the late document as the 'motion made' to file it, FN5 [omitted] it would have had to interpret 'cause shown' to mean merely 'cause,' since respondent made no 'showing' of cause at all; and finally, it would have had to find as a substantive matter that there was indeed 'cause' for the late filing, and that the failure to file on time 'was the result of excusable neglect.'" *Lujan,* at 895-897

STATEMENT OF THE CASE

A. Relevant procedural developments and dates. (All docket references in the following list are to App G, "Selected Entries from the Docket of the District Court," in App., at 18a-34a)

1 **21 March 2006:** Court issues "Pre-Trial Scheduling Order in Pro Se Action." Among the dates is 30 March 2007, by which time "pretrial motions" are due (Docket Entry 47, in App , at 33a-34a)

2 **21 April 2006**: Court permits Plaintiff to file and serve amended complaint no later than 5 May, Defendants must respond (either in the form of an answer or a motion) no later than 16 June. (Docket Entry #50, in App , 33a.)

3 **5 - 22 May 2006**: Plaintiff serves "Second Verified and Amended Complaint" on all Defendants (Docket Entries #51-53, in App., at 30a-33a.)

4. **16 June 2006:** All Defendants but Eugene G Eisner file FRCP 12 (b) (6) motions to dismiss the verified, amended complaint (Docket Entries #55-59, in App , at 29a-30a)

5. **5 July 2006:** Defendant Eugene G Eisner files answer to second verified and amended complaint. (Docket Entry #62, in App , at 28a.)

6. **6 December 2006:** Court denies and grants various motions by Defendants to dismiss the complaint. (Docket Entries #77-79, in App , at 26a-27a)

7. **21 February 2007:** Each Defendant, except L Robert Batterman, whose motion to dismiss the complaint was denied, files an answer to the verified complaint. (Docket Entries #89-96, in App , at 24a-26a)

8 **30 March 2007:** All Defendants, except Eugene G Eisner and L. Robert Batterman, file motions for FRCP 56 summary judgment as ordered in "Pre-Trial Scheduling Order" (Docket Entry #97, in App., at 23a-24a.)

9. **18 May 2007:** Plaintiff files "Plaintiff's

Objections to Filing Opposition Papers to The Motion of Defendants Hough, Cameron, Carr, Diaz-Stevens, McGuckin, Morse, Ulanov, and Walton For Summary Judgment of the Claims Against Those Defendants in the Second Amended Complaint" (Docket Entry #102, in App , at 23a)

10 **28 June 2007:** L. Robert Batterman files answer to second, verified, and amended complaint (Docket Entry #104, in App., at 23a)

11. **24 August 2007:** The Court accepts Respondents' postdeadline answers as filed and grants motions for summary judgment (Docket Entry #105, in App , at 23a)

12 **24 September 2007:** The Court grants L Robert Batterman's request to extend time to move for summary judgment (Docket Entry #112, in App., at 22a.)

13 **2 October 2007:** The Court grants Eugene G. Eisner's request to extend time to move for summary judgment (Docket Entry #113, in App., at 21a-22a)

14. **5 and 17 October 2007:** L. Robert Batterman and Eugene G. Eisner move for summary judgment, respectively. (Docket Entries #114-116 and 118, in App , at 20a-21a)

15 **16 November 2007:** Plaintiff files objections to summary judgment again with "Addendum Filed in Response to 1) Motion for Summary Judgment for Defendant L Robert Batterman, Esq 2) Motion for Summary Judgment for Defendant Eugene G.Eisner, Esq "

16. **21 December 2007:** The Court grants L Robert Batterman's and Eugene G Eisner's motions for

summary judgment and orders the case closed. (Docket Entry #123, in App., at 18a-19a)

B. The record is devoid of any facts showing that Respondents attempted to comply with *Lujan* and with FRCP 6 (b). The facts necessary to show non-compliance with *Lujan* are voids in the flow of the procedural record. Had Respondents complied with *Lujan's* requirements to file their postdeadline answers upon "cause shown" and upon "motion made," those causes and motions would appear of record. As well, the District Court's findings of "excusable neglect" would have appeared and would have been based on the causes provided by Respondents in their motions to extend time to file.

1. Without a showing of cause and without a motion, Respondent Eisner filed a postdeadline answer 19 days late. Respondent Eugene G Eisner (Eisner), along with all other defendants, was ordered by the District Court to 'respond to the complaint" ("Second Verified and Amended Complaint," served 5 May 2006) "by June 16 [2006] " (App. G, Docket Entry #50, in App., at 33a.) Eisner was served on 22 May 2006 (App. G, Docket Entry #52, in App , at 31a.) On 5 July 2006, he filed a postdeadline answer. Eisner answered 19 days late. (App G, Docket Entry #62, in App., at 28a.)

2. Without a showing of cause and without a motion, Respondents Hough, Cameron, Carr, Stevens, McGuckin, Morse, Ulanov, and Walton filed postdeadline answers 62 days late. Respondents Joseph C. Hough, Jr (Hough), Euan K Cameron (Cameron), David M. Carr (Carr), Ana Maria Diáz-Stevens (Stevens), John A McGuckin

(McGuckin), Christopher L. Morse (Morse), Ann B Ulanov (Ulanov), and Janet R. Walton (Walton) were ordered, along with all other defendants, to "respond to the complaint" ("Second Verified and Amended Complaint," served 5 May 2006) "by June 16 [2006] " (App. G, Docket Entry #50, in App , at 33a.) Hough, Cameron, Carr, Stevens, McGuckin, Morse, Ulanov, and Walton were served the Second Verified and Amended Complaint on 5 May 2006. (App. G, Docket Entry #53, in App , at 30a-31a) Those eight Respondents filed and served a motion to dismiss the complaint pursuant to FRCP 12 (b) (6), on Petitioner on 16 June 2006 (App. G, Docket Entry #61, in App at 28a-29a) On 6 December 2006, the District Court denied the motion of those eight Respondents to dismiss the complaint. (App G, Docket Entry #79, in App , at 26a, see order and opinion, App C, in App , at 6a-11a) Pursuant to FRCP 12 (a) (4) (A), the answers of those eight Respondents to the complaint had " to be served within 10 days after notice of the court's action " Allowing for the "exclusions from brief periods" of less than 10 days[1] and allowing for the computation period to begin one day following the 6 December 2006 entry of the court's order, the answers of those eight Respondents were due on 21 December 2006 On 21 February 2007, each of those Respondents filed a postdeadline answer. (App. G, Docket Entries

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[1] **FRCP 6 (a), "Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute **(2) Exclusions from Brief Periods.** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days "

#89-96, in App., at 24a-26a) These Respondents answered 62 days late.

3. Without a showing of cause and without a motion, Respondent Batterman filed a postdeadline answer 189 days late. Respondent L Robert Batterman (Batterman), along with all other defendants, was ordered by the District Court to "respond to the complaint" ("Second Verified and Amended Complaint," served 5 May 2006) "by June 16 [2006] " (App G, Docket Entry #50, in App., at 33a.) Batterman filed and served a motion and memorandum of law to dismiss the complaint pursuant to FRCP 12 (b) (6), on Petitioner on 16 June 2006. (App. G, Docket Entries #58-59, in App., at 29a.) On 6 December 2006, the District Court granted, in part, and denied, in part, Batterman's motion to dismiss the complaint (App G, Docket Entry #78, in App , at 26a-27a, see order and opinion, App D, in App , at 11a-13a) Pursuant to FRCP 12 (a) (4) (A), Batterman's answer to the complaint had " to be served within 10 days after notice of the court's action." Allowing for the "exclusions from brief periods" of less than 10 days and allowing for the computation period to begin one day following the 6 December 2006 entry of the court's order, Batterman's answer was due on 20 December 2006 (See FN1, *super*) On 28 June 2007, Batterman filed a postdeadline answer (App G, Docket Entry #104, in App , at 22a-23a) Batterman answered 189 days late.

C. *Lujan* permits no discretion either to extend the 16 June and the 21 December answer deadlines or to accept the impermissibly filed answers after those deadlines. *Lujan* recognizes that a District Court has discretion to extend filing

deadlines–in this case both the 16 June and 21 December filing deadlines But *Lujan* bars the exercise of that discretion until that discretion has been "invoked" by the two-step "mechanism" found in FRCP 6 (b). "This provision [FRCP 6 (b)] not only specifically confers the 'discretion' relevant to the present issue . . . but [FRCP 6 (b)] also provides the mechanism by which that discretion is to be invoked and exercised " *Lujan*, at 896.

The facts showing that Respondents and the District Court failed to trigger the *Lujan* late-filing "mechanism" are indisputable After missing the 16 June 2006 deadline, Eisner made no attempt to invoke the court's discretion through the two-step "mechanism–"cause shown" and "motion made," neither did the remaining Respondents after missing the 21 December deadline. The District Court, lacking "cause shown" and "motion made" from any Respondent, lacked the basis to find "excusable neglect "

Lujan allows the following three conclusions about the two answer deadlines based on these facts 1) the 16 June and 21 December answer deadlines remained in effect for the duration of *Frierson-Harris* v *Hough, et al.*, 2) no Respondent could have answered by an extended deadline, since no Respondent took the two steps to invoke the court's discretion to extend the answer deadline, 3) no Respondent's postdeadline answer is timely Pursuant to *Lujan*, Respondents' postdeadline answers can be characterized as nothing more than nullities (" . any *post*deadline [emphasis in original] extension must be 'upon motion made,' and *is permissible only* [emphasis added] where the failure

to meet the deadline 'was the result of excusable neglect.'" *Lujan*, at 896)

Despite the absence of Respondents' compliance with any *Lujan* requirements, the District Court found discretion in Petitioner's supposed failure to complain about the late-filed answers and in his failure to use those late-filed answers to oppose summary judgment.

> The Seminary defendants filed answers to the second amended complaint in February 2007 *Regardless of whether the answers to the second amended complaint were timely filed, Harris has not previously complained about the delay* More importantly, he had nearly three months to peruse the answers before the May 18 deadline for filing an opposition to the motion to dismiss (Emphasis added) (S.D.N Y. "Opinion & Order," 24 August 2007, at 6; see docket entry, App. G, Docket Entry #105, in App , at 23a)

(The court had to be aware that Petitioner had "complained " On the previous page of the 24 August 2007 "Opinion . ." the court noted "On May 18, [Harris] filed a document that he characterized as objections to filing opposition papers. . . . *He also argued that the defendants had not filed timely answers to the second amended complaint.* [Emphasis added] "Opinion . ," at 6 See Part E, below, at 15-17, for a more complete discussion both of Petitioner's objections to summary judgment and of Petitioner's preservation of the question of Respondents' failures to answer at the district and appellate levels)

The District Court found the absence, allegedly, of Petitioner's complaint about impermissible

postdeadline answers to be the mechanism by which it could accept those answers *sua sponte* by 24 August 2007 But *Lujan* recognizes no"mechanism" to permit an extension of a filing deadline other than the two-step "cause shown" and "motion made" one In the instant case, the long interval between Respondents' failures to follow *Lujan's* two-step process and the court's *sua sponte* exercise of discretion to overlook those failures, relieve Petitioner of the need to have "complained," if, indeed, he really neglected to By 18 May 2007, the date Petitioner "argued" that Respondents had yet to answer, Eisner had waited a period of 336 days following the 16 June deadline without attempting either to show "cause" or to make a "motion.". By that 18 May date, the remaining Respondents had waited a period of 148 days following the 21 December deadline without attempting to take either required step. Having been alerted to Petitioner's objections on 18 May or thereabout, all Respondents had until 24 August 2007, at least another 98 days, to take the two steps to invoke the court's discretion to accept their postdeadline answers

Surely *Lujan* allows no court's extension of postdeadline filing dates–*sua sponte* or otherwise–premised on the failure of an opposing, non-filing party to complain Indeed, in the instant case, *Lujan* burdens Respondents with additional "cause shown " to explain why they failed to take the two steps over two lengthy periods of time.

D. Only in the instant case has a Circuit condoned a District Court's acceptance of a postdeadline filing absent compliance with *Lujan*. Even in *Lujan*, Respondents, the National Wildlife Federation, made what was arguably an

attempt to request an extension of time to late-file affidavits during FRCP 56 process. The question of FRCP 6 (b) compliance ultimately turned on whether notice provided by Respondents in a footnote was comparable to the formal notice expected in a motion and whether, even admitting such formal notice, the District Court had abused its discretion to reject the affidavits *Lujan,* FN5, at 896 A more common factual context presented in Circuit cases is the lower court's rejection of a late-filing even though *Lujan* compliance–or some contested attempt to comply–is a matter of record See, for example, *Figgie Intern., Inc. v. Bailey,* 25 F.3d 1267 (C A.5,1994) and citations to other courts of appeals' decisions therein, at 1273, FN21.

Petitioner, a non-lawyer,[2] has found one case with a fact pattern similar to the instant case The Court of Appeals for the District of Columbia–presented with the failure of a party to attempt to comply with *Lujan's* two-step process to make a permissible late-filing–considered a lower court's attempted exercise of discretion, *sua sponte*, to disregard *Lujan* by accepting the late-filing: *Smith v. District of Columbia,* 430 F.3d 450 (2005).

That court (reversed previously by *Lujan* for considering untimely affidavits rejected by the District Court in that case) found itself "compelled" to reverse

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Petitioner has consulted with no lawyer or other legal professionals in the preparation of this Petition or in the legal research underlying this Petition Indeed, Petitioner, other than working with a family member to proof the drafts of, as well as to assist with the word-processing of, this Petition, has produced this Petition alone For informational purposes, Petitioner has consulted Eugene Gressman, *et al* , *Supreme Court Practice,* 9th ed , (Arlington, VA BNA Books, 2007)

a District Court's acceptance of an untimely filing. The party in *Smith*, like Respondents in the present case, deliberately "never moved for an extension of the deadline." *Id* And like the District Court in the present case, "the trial court had no basis on which to exercise its discretion." *Id.* Thus the *Smith* court declined to allow the filing on appeal "Under these circumstances, then, we are compelled to conclude that the District Court abused its discretion in entertaining the late motion for summary judgment on Smith's disability discrimination claim." *Id*

When presented with a late-filing unaccompanied by motion, other courts of appeals have sustained uniformly a lower court's rejection of the late filings. For example, see *Miller v. Home Depot U S.A., Inc.*, unpublished opinion, 95 F 3d 50 (C A. 5, 1996) ("Here, Appellants made no motion for extension nor any showing of 'cause.' We therefore hold that the District Court did not abuse its discretion in excluding the affidavits as untimely filed" *Miller*, at 3) Also see *Stringfellow v Brown*, 105 F.3d 670 (unpublished decision) (C A.10, 1997) ("No explanation or 'reasonable basis' ["cause shown"] is given why an extension was not requested. Because plaintiff's failure to respond does not seem to be due to 'neglect,' there was no error in denying his motion for reconsideration." *Stringfellow*, at 2) Also see *Stringfellow* for citations to similar cases and rulings from the 7th, 9th, 10th, and 11th Circuits

Prior to the instant case, the Second Circuit had no reported or unreported conflict with *Lujan* That is, it too prohibits a court's consideration of filings that fail to meet the "mechanism" threshold In *Shapiro, et al v. Cantor, et al*, 123 F.3d 717 (1997), the Circuit forbids consideration of an untimely filing absent a

"proper motion." In that case, Plaintiffs " . submitted the late affidavit without attempting to meet the requirements for late filing under Rule 6 of the Federal Rules of Civil Procedure." *Shapiro*, at 722. The Circuit not only affirmed the lower court's rejection of the affidavit but framed its affirmance prohibitively "As the District Court *could not consider* the untimely affidavit *without a proper motion* [emphasis added], [Lujan citation omitted], (applying Fed R Civ. P 6 and noting that '**any *post* deadline extension *must* be 'upon motion made'**) . . '[emphasis in Shapiro], we likewise do not consider the affidavit." *Shapiro*, at 722

Even the dissent in *Lujan* (Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens) would probably not have affirmed the District Court's *sua sponte* acceptance of the postdeadline answers in the instant case. The 21 December 2006 deadline was rule-based, specifically FRCP12 (a) (4) (A): "If the Rules imposed an absolute deadline for the submission of evidentiary materials, the District Court could not be faulted for strictly enforcing that deadline, even though the result in a particular case might be unfortunate " *Lujan*, at 905.

The instant case carves out an unexplained, apparently unique, Second-Circuit, one-time exception to *Lujan*. Other than the instant case, across the circuit courts of appeals and within the Second Circuit, it can be argued that *Lujan* stands not only for the proposition that a late filing without cause shown, motion made, and excusable neglect found is an impermissible late filing But, more importantly, it can be argued that *Lujan* stands for the proposition that both the district and appellate courts lack discretion to make any such filing permissible

E. The question–whether Respondents answered the verified complaint–was raised in the lower court and was preserved on appeal. Petitioner questioned Respondents' late-filed answers twice in both the district and appellate courts Both courts ignored those questions

Petitioner first objected on 18 May 2007 in: "Plaintiff's Objections to Filing Opposition Papers to The Motion of Defendants Hough, Cameron, Carr, Diaz-Stevens, McGuckin, Morse, Ulanov, and Walton For Summary Judgment of the Claims Against Those Defendants in the Second Amended Complaint" ("Objections ."):

> Defendants' refusal[s] to answer the Second Amended Complaint–following the Court's denial of their motion to dismiss the complaint for failure to state a cause for relief (Rule 12 (b)(6)–calls into question the validity of their claim that no genuine issue of fact exists The refusal of Defendant Batterman to answer the Second Amended Complaint–thus rendering <u>all</u> allegations against <u>all</u> parties in the Second Amended Complaint <u>admitted</u>–leaves no Defendant any basis to move for summary judgment on either the law or the facts. [emphasis in original] . . The admission of *all* allegations in the Second Amended Complaint as a result of the *refusal*–now, 150 days since the due date of the answers–of *all* Defendants to deny those allegations–despite the court's holdings–begs the question as to what basis, if any, Defendants have to seek summary judgment in their favor [emphasis in original].

("Objections ..." at 8 and 9, also see App G, Docket Entry #102, in App , at 23a.)

Petitioner next objected on 16 November 2007 in an addendum to"Objections . " "Addendum Filed in Response to 1) Motion for Summary Judgment for Defendant L Robert Batterman, Esq. 2) Motion for Summary Judgment for Defendant Eugene G Eisner, Esq " ("Objections Addendum . ") (See the full document in App I, in App., at 40a-52a) The addendum cites case-law and authorities to argue that, until the court makes an evidentiary ruling on whether Respondents have admitted the factual allegations in the verified complaint, summary judgment can not proceed fairly. (App I, in App., at 40a*ff*)

In the appellate court, Petitioner raised the question of Respondents' failures to answer in "FORM C – Addendum B Issues Proposed to Be Raised on Appeal And Standard of Review for Each Proposed Issue (Supplemental filing of Form C – Addendum B. Previous filing of Form C along with Addendum A on 1 February 2008." (See full document, App H, in App., at 42a-49a) The objections to the late-filed answers and to their being considered in the District Court and on appeal are found in "Issue[s] on Appeal" "V," "VI," "VII," and "VIII." (App H, in App , at 34a-40a)

Next, Petitioner raised the question in the opening brief: "Appellant's Opening Arguments, Submitted in Memorandum Form" ("App. Opening Arguments"). Again, Petitioner questioned whether Respondents had admitted the factual allegations of the verified complaint

> Because review of the issues of this appeal are *de novo* and because the record is brief and devoid of facts–save those facts pleaded, but not denied, in the verified second amended complaint–I herewith incorporate all of my District Court filings, each in its entirety, into this memorandum (App Opening Arguments, at 1.)

Lastly, Petitioner raised the question of Respondents' failures to answer in the context of fair summary judgment, citing *Lujan* and Second Circuit precedent, in the Reply brief, "Appellant's Consolidated Reply to Briefs of Defendants-Appellees" ("App. Reply Brief"):

> Defendants' admissions following denial of their F.R.C.P. 12 (b) motions to dismiss on 6 December 2006 and their failure to answer within 10 days have to be deliberate As of this writing, they have never engaged in the mandatory Rule 6 (b) motion practice to extend time to file their answers to the Second Verified and Amended Complaint.FN6 [FN6. citing *Lujan v. National Wildlife Fed'n*, 497 U S. 871 (U S., 1990) [and] *Shapiro v. Cantor*, 123 F.3d 717 (C A 2, 1997) omitted] (App Reply Brief, at 23.)

REASONS FOR ALLOWANCE OF THE WRIT

A. This Court's holdings in *Lujan* must be followed by the Second Circuit as they have been uniformly by the other circuits and as they have been previously by the Second Circuit. The *Frierson-Harris v Hough, et al.* ruling conflicts directly and clearly with *Lujan* jurisprudence throughout the federal judiciary No circuit, including the Second, has affirmed a lower court's discretion to accept postdeadline filings with no effort on the part of the late-filing party to follow the two-part requirement Without following that requirement, this Court holds, a party fails to invoke the court's discretion to extend a filing deadline.

B. More than error, the decision of the Second Circuit invites this Court's Rule 10 (a) supervisory power. Affirming the *sua sponte* exercise of discretion where it is expressly forbidden by *Lujan*, the Second Circuit "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by [the District Court], as to call for an exercise of this Court's supervisory power " Rules of the Supreme Court of the United States, Rule 10 (a). The affirmance is no mere erroneous decision of the sort this Court avoids in order not to turn itself into a court of errors. (See *Ross v. Moffitt*, 417 U S. 600, 616-617. "This Court's review, much like that of the Supreme Court of North Carolina, is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review ") In the instant case not only is there incorrectness but there is apparent repudiation of *Lujan* and of the need to follow this Court's precedents

If this Court sees fit to exercise its supervisory power, it will be doing so to preserve the rule of law more than to bring justice to a lone petitioning litigant.

C. Petitioner relied on FRCP 6 to his detriment. At no time prior to accepting Respondents' impermissible postdeadline answers in the 24 August 2007 opinion did the court signal that it contemplated invoking the discretion to do so *sua sponte* Petitioner was unfairly surprised by the court's failure to follow FRCP 6 process. Petitioner relied on Second Circuit law and other authority to oppose summary judgment only on the verified complaint in face of Respondents' possible admissions of the unanswered, well-pleaded allegations in the verified complaint (See full discussion of relevant Second Circuit law on judicial admissions, local rules concering summary judgment, and FRCP 8 (d) admissions in App I, in App ,at 40a-52a.) Granting the writ and returning the case to the Second Circuit with directions to follow *Lujan* will allow the Circuit to consider fairly all the issues Petitioner raised on appeal as outlined in the addendum to Form C (App. H , in App., at 34a-40a) I herewith serve notice that all issues in Form C are preserved should this court grant the writ and order

CONCLUSION

For all the foregoing reasons, Petitioners respectfully requests that the Supreme Court grant review of this matter

Respectfully submitted,
Michael W Frierson-Harris, *pro se*
301 Cathedral Parkway, Apt 6E
New York, NY 10026
917.331.1894

APPENDIX

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Appendix A - 1 September 2009 Order of the Second Circuit Denying Petition for Rehearing *En Banc.*

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of September, two thousand nine.

MICHAEL WESLEY FRIERSON-HARRIS, PH D , also known as MICHAEL WESLEY HARRIS,
Plaintiff-Appellant,

v No 08-0453-cv

PH D JOSEPH C. HOUGH, JR., as President of Union Theological Seminary and individually,
PH.D. EUAN K. CAMERON, as Academic Dean of Union Theological Seminary and individually,
ANDREW SQUIRE, EUGENE G EISNER, DAVID E. FRAZER, ESQ., JOHN A. MCGUCKIN, JANET WALTON, L. ROBERT BATTERMAN, as an individual and as a co conspirator,
PH D. DAVID M CARR, as an individual and as a conspirator, PH.D CHRISTOPHER L. MORSE, as an individual and as a co conspirator, PH D ANN B. ULANOV, as an individual and as a co-conspirator,
Defendants-Appellees,

TH D HOLLAND L HENDRIX, as President of Union Theological Seminary and individually, PH.D. ROSEMARY S KELLER, as Academic Dean and individually, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY, MARY E

MACNAMARA, as Vice President of Union Theological Seminary and individually, UNION THEOLOGICAL SEMINARY, BOARD EXECUTIVE COMMITTEE,
Defendants.

Michael Wesley Frierson-Harris having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

[SEAL - dated "SEP 1 2009"]

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

_____/s/_____
By. Frank Perez, Deputy Clerk

Appendix B - 20 July 2009
Amended Summary Order
of the Second Circuit

This case was not selected for publication in the Federal Reporter
C A 2 (N.Y.),2009.
Frierson-Harris v. Hough
328 Fed.Appx. 753, 2009 WL 2144364 (C A.2 (N Y))

United States Court of Appeals,

Second Circuit

Michael Wesley FRIERSON-HARRIS, PH D , also known as Michael Wesley Harris,
Plaintiff-Appellant,

v

PH D Joseph C HOUGH, Jr , as President of Union Theological Seminary and individually, PH D. Euan K Cameron, as Academic Dean of Union Theological Seminary and individually, Andrew Squire, Eugene G Eisner, David E Frazer, Esq , John A. McGuckin, Janet Walton, L. Robert Batterman, as an individual and as a co conspirator, PH.D. David M Carr, as an individual and as a conspirator, PH D. Christopher L. Morse, as an individual and as a co conspirator, PH D. Ann B Ulanov, as an individual and as a co conspirator,
Defendants-Appellees,

TH D. Holland L. Hendrix, as President of Union Thelogical Seminary and individually, PH.D Rosemary S Keller, as Academic Dean and individually, The Trustees of Columbia University in the City, Mary E MacNamara, as Vice President of Union Theological Seminary and individually, Union Theological Seminary, Board Executive Committee, Defendants

No. 08-0453-cv

July 20, 2009

Appeal from a judgment of the United States District Court for the Southern District of New York (Cote, J.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED

Michael Wesley Frierson-Harris, New York, N Y., pro se

Howard Z. Robbins, Proskauer Rose LLP, James E. Carroll and C. Alexa Abowitz, Cetrulo & Capone, A. Michael Furman, Furman Kornfeld & Brennan LLP, Nathaniel K. Charney, Eisner & Mirer, P.C., New York, N Y., for Appellees

PRESENT B.D. PARKER and RICHARD C. WESLEY, Circuit Judges, NICHOLAS TSOUCALAS,FN* Judge, Court of International Trade.

[SEAL – dated "JUL 20 2009"]

FN* The Honorable Nicholas Tsoucalas, Senior Judge of the United States Court of International Trade, sitting by designation.

*754 AMENDED SUMMARY ORDER

**1 Appellant Michael Wesley Frierson-Harris ("Harris"), pro se, appeals from the district court's judgment dismissing his complaint and amended complaints brought pursuant to, inter alia, 42 U.S.C §§ 1981, 1983 & 1985. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues raised on appeal

We review de novo a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *Chambers v. Time Warner, Inc* , 282 F.3d 147, 152 (2d Cir 2002) We review a district court's order

granting summary judgment de novo, and ask whether the court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. See *Miller v Wolpoff & Abramson, L L.P.*, 321 F 3d 292, 300 (2d Cir.2003).

We have considered all of Harris's arguments on appeal and find them to be without merit We affirm for substantially the same reasons as those stated by the district court in its thorough and well-reasoned opinions and orders

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT [SEAL - dated JUL 1 2009]
Catherine O'Hagan Wolfe, Clerk
By: _____/s/_____
[Frank Perez]

Appendix C - 6 December 2006
Memorandum Opinion and Order
of the District Court Granting and Denying
the Motions of Various Defendants to Dismiss.

United States District Court,
S.D. New York
Michael Wesley FRIERSON-HARRIS, Ph D , a/k/a
Michael Wesley Harris, Plaintiff,
v.
Joseph C. HOUGH, Jr. et al , Defendants
No. 05 Civ. 3077(DLC) Dec. 6, 2006

Dr Michael Wesley Frierson-Harris, New York, NY, pro se

MEMORANDUM OPINION & ORDER

DENISE COTE, District Judge·

*1 This case arises out of a dispute between plaintiff, Dr. Michael Wesley Frierson-Harris ("Harris"), and his former employer, Union Theological Seminary (the "Seminary"). Harris alleges that various people affiliated with the Seminary-as well as the Seminary's lawyers, Harris's own lawyers, a moving company, and an employee of a property management firm-conspired to violate his civil rights on the basis of his race A more complete description of the facts alleged by Harris is contained in the Opinion and Order previously issued in this case, familiarity with which is assumed Frierson-Harris v. Hough, No 05 Civ 3077(DLC), 2006 WL 298658 (S D N Y. Feb 7, 2006) (the "February 7 Opinion") Through separate Orders bearing today's date, motions to dismiss Harris's second amended complaint were (1) granted with respect to David E Frazer, one of plaintiff's former attorneys, and (2) granted in part and denied in part with respect to L Robert Batterman and John F. Fullerton, III, the Seminary's outside counsel. The remaining defendants ("moving defendants") bring this motion to dismiss the claims against them FN1

> FN1 Defendant Eugene G. Eisner, another of plaintiff's former attorneys, does not appear to join in any of the motions to dismiss Instead, on July 5, 2006, he filed an answer to the second amended complaint

I. The Section 1981 Claim

Harris brings a claim pursuant to 42 U S C § 1981 ("Section 1981") against defendant Joseph H. Hough ("Hough"), the current president of the Seminary The moving defendants argue that the doctrines of res judicata and collateral estoppel prohibit Harris from arguing that he was contractually entitled to the apartment he desires, since Harris litigated-and lost-that issue in an Article 78 proceeding before a New York State court According to the moving defendants, if Harris does not have a contractual right to that apartment, he cannot bring a Section 1981 claim. This argument is flawed

"Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action " *D.H. Blair & Co., Inc v. Gottdiener*, 462 F.3d 95, 112 (2d Cir.2006) (citation omitted) Res judicata, however, does not apply to preclude federal civil rights claims brought by an unsuccessful Article 78 plaintiff "because a state court entertaining an Article 78 proceeding does not have the power to award the full measure of relief available" in federal civil rights proceedings *Vargas v. City of New York*, 377 F 3d 200, 205 (2d Cir.2004) Therefore, res judicata does not bar Harris's Section 1981 claim

Under New York law, collateral estoppel, or issue preclusion, occurs if "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding " *Id.* at 205-06. Even assuming that the moving defendants' characterization of the state court proceedings is accurate, however, it does not provide a legal basis for dismissing the claims against them While it is true

that "a plaintiff cannot state a claim under Section 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce,'" *Domino's Pizza, Inc. v McDonald -U S.-*, 126 S Ct 1246, 1252 (2006) (quoting Section 1981), moving defendants err in assuming that Harris's claim cannot survive in the absence of a contractual guarantee to the apartment at issue Harris, after all, does not bring a claim for breach of contract, but for race discrimination. Harris's employment agreement provides him with the contractual relationship required for a Section 1981 claim, and his assertion that the Seminary assigned him "substandard" housing on the basis of his race is sufficient to survive this motion to dismiss FN2

FN2. Furthermore, the moving defendants overlook the fact that the denial of housing is not the only adverse employment action alleged by Harris He also alleges, among other things, that Hough participated in a conspiracy to make curricular changes that adversely affected him on account of his race, and later conspired to terminate his Seminary employment These alleged actions were not addressed in the proceedings below

II. The Section 1985 Claim

*2 Harris brings a claim pursuant to 42 U S C. § 1985 against all defendants in this action As explained in the February 7 Opinion, a Section 1985 claim cannot be maintained if the plaintiff does not "provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, explicit or tacit, to achieve the unlawful end." Frierson-Harris, 2006 WL 198658 at *5 (quoting Webb v Goord, 340 F.3d 105, 110 (2d Cir 2003)) With respect to

defendants Michael Maloney ("Maloney"), Nick Zuhusky ("Zuhusky"), and Despatch Moving & Storage ("Despatch"), the second amended complaint includes no facts that would support such a meeting of the minds Indeed, even according to plaintiff's version of events, these defendants have done nothing inconsistent with their roles as agents of the Seminary or their duties as property managers, movers, and storage facilities, respectively Further, they had no involvement in-and no decision-making authority over-the allegedly discriminatory employment decisions made by the Seminary. The action will therefore be dismissed as to Maloney, Zuhusky, and Despatch

It will also be dismissed as to defendant Randall Balmer ("Balmer"), a professor of religion at Barnard College. Again, Harris has not pled any facts that would support a conclusion that Balmer conspired with the other defendants Furthermore, Balmer is not an employee of the Seminary, and his role in the discrimination allegedly suffered by Harris is therefore far too attenuated to support a claim

The Section 1985 claim against the other defendants will, however, go forward Harris claims that Hough and the named members of the Seminary faculty conspired to alter the Seminary's housing assignment policy, to make changes to the curriculum that impaired Harris's ability to do his job, and ultimately, to fire him Certain of these adverse employment actions apparently required faculty approval and, therefore, the active involvement of Hough and the faculty defendants

Conclusion

The motion to dismiss the second amended complaint

is granted with respect to defendants Maloney, Zuhusky, Despatch, and Balmer. It is otherwise denied.

SO ORDERED:
Dated: New York, New York
December 5, 2006
_____/s/_____
DENISE COTE
United States District Judge

Appendix D - 5 December 2006
Order of the District Court
Granting/Denying
the Motions of Various Defendants
to Dismiss the Complaint.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
MICHAEL WESLEY FRIERSON-HARRIS, PH D.,
a/k/a MICHAEL WESLEY HARRIS,
Plaintiff,

-v-

JOSEPH C HOUGH, JR et al ,
Defendants

05Civ 3077(DLC)
ORDER

DENISE COTE, District Judge·

L. Robert Batterman ("Batterman") and John F. Fullerton, III ("Fullerton") have renewed their motion to dismiss the claims pleaded against them by Michael Wesley Frierson-Harris, most recently in his second amended complaint. Familiarity with Frierson-Harris v. Hough, No 05 Civ 3077 (DLC) , 2006 WL 298658 (S.D N Y. Feb 7, 2006) (the "February 7 Opinion"), which dismissed the claims against these defendants in the first amended complaint, is assumed. It is hereby

ORDERED that the claim against Batterman and Fullerton pleaded under 42 U S C § 1985 is dismissed for the reasons cited in the February 7 Opinion, and for failure to cure the deficiencies' cited in that Opinion

IT IS FURTHER ORDERED that the motion by Fullerton to dismiss the claim under New York State Human Rights Law § 296(6) is granted for failure to state a claim against him All claims against Fullerton having been dismissed, the action against him IS dismissed

IT IS FURTHER ORDERED that the motion to dismiss the claim against Batterman under New York State Human Rights Law § 296(6) is denied.

IT IS FURTHER ORDERED that decision is reserved on Batterman's motion to dismiss the claim under 42 U S C § 1981. The motion may be renewed in the context of summary judgment practice.

SO ORDERED.

Dated New York, New York
December 5, 2006

_____/s/_____
DENISE COTE
United States District Judge

Appendix E - 20 April 2006: Order of the District Court allowing Service of the Second Verified and Amended Complaint, Setting FRCP Rule 12 Submission Dates, and, alternatively, Setting Time to Answer Complaint

MICHAEL WESLEY FRIERSON-HARRIS, Ph.D , a/k/a MICHAEL WESLEY HARRIS,
Plaintiff,

-v-

UNION THEOLOGICAL SEMINARY; BOARD EXECUTIVE COMMITTEE (1998-2005); Ph D JOSEPH C. HOUGH, JR , as President' of Union Theological Seminary, Ph D JOSEPH C. HOUGH, JR , individually; MARY E MACNAMARA, as Vice-President of Union Theological Seminary, MARY E MACNAMARA, individually; Ph D EUAN K CAMERON, as Academic Dean of Union Theological Seminary, Ph D EUAN K CAMERON, individually; Ph.D HOLLAND L. HENDRIX, as President (Emeritus) of Union Theological Seminary, Ph.D HOLLAND L HENDRIX, individually, Ph D ROSEMARY S KELLER,as Academic Dean (Emerita), Ph D ROSEMARY S. KELLER, individually, THE TRUSTEES OF COLUMBIA UNIVERSITY in the City of New York; DESPATCH MOVING AND STORAGE COMPANY, INC.; L ROBERT BATTERMAN, JOHN F FULLERTON,

III, ANDREW SQUIRE, and EUGENE G EISNER,
Defendants

05 CIV. 3077 (DLC)
ORDER

DENISE COTE, District Judge

On March 21, 2006, a Pretrial Scheduling Order was issued prohibiting any amendment of pleadings or joinder of parties after April 14 On April 14, plaintiff submitted a motion requesting leave to serve an amended complaint on defendants who had previously dismissed and a "supplemental" complaint on additional defendants It is hereby

ORDERED that plaintiff may file a single complaint incorporating his charges against all defendants no later than May 5

IT IS FURTHER ORDERED that defendants shall respond to the complaint by June 16. If the response is in the form of a motion, plaintiff shall submit his opposition by July 14 Defendants shall submit any reply by July 28

IT IS FURTHER ORDERED that when filing any papers with the Court, the parties shall provide a courtesy copy to Chambers by sending them to this Court's Pro Se Office, Room 230, United States courthouse, 500 Pearl Street, New York, New York 10007

SO ORDERED:
Dated New York, New York
April 20, 2006

_____/s/_____
DENISE COTE
United States District Judge

Appendix F - 21 March 2006
Pre-Trial Scheduling Order
of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL WESLEY FRIERSON-HARRIS, Ph D ,
a/k/a MICHAEL WESLEY HARRIS,
Plaintiff,

--v--

UNION THEOLOGICAL SEMINARY; BOARD EXECUTIVE COMMITTEE (1998-2005), Ph D JOSEPH C HOUGn, JR., as President of Union Theological Seminary, Ph D JOSEPH C HOUGH, JR , individually, MARY E MACNAMARA, as Vice-President of Union Theological Seminary; MARY E MACNA MARA, individually, Ph.D EUAN K CAMERON, as Academic Dean of Union Theological Seminary, Ph D EUAN K CAMERON, individually, Ph D HOLLAND L. HENDRIX, as President (Emeritus) of Union Theological Seminary; Ph D HOLLAND L. HENDRIX, individually, Ph D ROSEMARY S. KELLER, as Academic Dean (Emerita), Ph D ROSEMARY S KELLER, individually; THE TRUSTEES OF COLUMBIA UNIVERSITY in the City of New York,

DESPATCH MOVING AND STORAGE COMPANY, INC , L. ROBERT BATTERMAN; JOHN F FULLERTON, III, ANDREW SQUIRE, and EUGENE G EISNER
Defendants

05 CV 3077 (DLC)
Pre-Trial
Scheduling Order
In Pro Se Action

DENISE COTE; District Judge:

The above-captioned action, which plaintiff has filed pro se, has been assigned to me In order to guide the parties in their pursuit of the lawsuit, to assure that both sides become aware of the positions and contentions of the other, and to assure that the action moves expeditiously, I am entering the following order.

The parties having agreed to participate in mediation, the Clerk of Court shall contact the parties when a mediator has been selected

IT IS ORDERED that no additional parties may be joined or pleadings amended after **April 14, 2006.**

IT IS FURTHER ORDERED that all pretrial inquiry by each party into the evidence and knowledge of the other, whether by interrogatories, depositions production of documents, or other I discovery methods be completed by **November 17, 2006** ,

IT IS FURTHER ORDERED that if either party intends to use expert testimony, the following

schedule shall govern expert discovery and pretrial motions

-Plaintiff's identification of experts and disclosure of expert testimony conforming to the requirements of Rule 26(a) (2) (B), Fed R Civ. P , must occur by **December 22, 2006**

-.Defendants' identification of experts and disclosure of expert testimony must occur by **January 26, 2007**

IT IS FURTHER ORDERED that all expert discovery shall be completed by **February 23, 2007**.

IT IS FURTHER ORDERED that all pretrial motions be submitted by **March 30, 2007** If a motion is filed, opposition papers must be submitted by **April 27, 2007**, and reply papers, if any, must be submitted by **May 11, 2007**. A "Notice For Pro Se Litigants Regarding Opposition to a Summary Judgment Motion" is attached. Either party, may request to have the dates for the completion of discovery or for motions extended, and they will be extended if the party requesting the extension demonstrates that its pursuit of the action has been diligent and that there is a good reason for extending the deadline If no extensions are granted, no pretrial motions or discovery will be permitted, after these dates.

IT IS FURTHER ORDERED that when filing any papers with the Court, the parties shall provide a courtesy copy to Chambers by sending them to this Court's Pro Se Office, Room 230, United States Courthouse, 500 Pearl Street, New York, New York 10007.

IT IS FURTHER ORDERED that failure to comply with any of the terms of this Order may constitute grounds for the denial of requested relief,

dismissal of the action, the entry of judgment by default, or such other action as may be just in the circumstances.

SO ORDERED:

Dated: New York, New York
March 21, 2006
/s/
DENISE COTE
United States District Judge

Appendix G - Selected Entries from the Docket of the District Court

123	12/21/2007 OPINION AND ORDER: FOR THE REASONS SET FORTH HEREIN, SUMMARY JUDGMENT IS GRANTED IN FULL TO DEFENDANTS EISNER AND BATTERMAN THE CLERK OF COURT SHALL CLOSE THE CASE (SIGNED BY JUDGE DENISE L COTE ON 12/21/07) COPIES SENT BY CHAMBERS (DLE) (ENTERED 12/26/2007)
122	12/14/2007 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT RE. 114 MOTION FOR SUMMARY JUDGMENT DOCUMENT FILED BY L ROBERT BATTERMAN (AS AN INDIVIDUAL AND AS A CO CONSPIRATOR). (DJC) (ENTERED: 12/18/2007)

121 12/14/2007 RESPONSE TO PLAINTIFF'S OBJECTION DOCUMENT FILED BY EUGENE G. EISNER (DJC) (ENTERED: 12/18/2007)

120 11/16/2007 OBJECTIONS TO FILING OPPOSITION PAPERS TO THE MOTION OF DEFENDANTS HOUGH, CAMERON, CARR, DIAZ-STEVENS, MCGUCKIN, MORSE ULANOV AND WALTON FOR SUMMARY JUDGMENT OF THE CLAIMS AGAINST THOSE DEFENDANTS IN THE SECOND AMENDED COMPLAINT DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD (DJC) (ENTERED 11/20/2007)

118 10/17/2007 MOTION FOR AN ORDER, PURS TO F R C P. 56 AND AND OF THE LOCAL RULES, GRANTING SUMMARY JUDGMENT AND DISMISSING WITH PREJUDICE THE SECOND AMENDED COMPLAINT IN ITS ENTIRETY PLEASE TAKE FURTHER NOTICE THAT OPPOSING PAPERS, IF ANY, MUST BE SERVED UPON DEFENDANT'S COUNSEL NO LATER THAN 11/16/07, PURS TO THE 10/9/07 ORDER OF JUDGE COTE DOCUMENT FILED BY EUGENE G EISNER RETURN DATE SET FOR 12/7/2007 AT 10:00 AM. NOTICE TO PRO SE LITIGANT OPPOSING NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION ATTACHED. (TRO) (ENTERED 10/22/2007)

117 10/09/2007 ORDER THAT EISNER'S

REQUESTS TO FILE HIS SUMMARY JUDGMENT MOTION BY 10/19/07 IS GRANTED. PURSUANT TO THE ORDER OF OCTOBER 2, PLAINTIFF'S OPPOSITION TO THE BATTERMAN AND EISNER MOTIONS IS DUE 11/16/07 AND THEIR REPLIES ARE DUE 12/7/07. (SIGNED BY JUDGE DENISE L. COTE ON 10/9/07) (DLE); MODIFIED ON 10/22/2007 (WONG, BENNY) (ENTERED 10/12/2007)

116 10/05/2007 NOTICE OF TO PRO SE LITIGANT OPPOSING MOTION FOR SUMMARY JUDGMENT RE 114 MOTION FOR SUMMARY JUDGMENT. DOCUMENT FILED BY L. ROBERT BATTERMAN (AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) (JAR) (ENTERED: 10/09/2007)

115 10/05/2007 MEMORANDUM OF LAW IN SUPPORT RE· 114 MOTION FOR SUMMARY JUDGMENT DOCUMENT FILED BY L. ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) (JAR) (ENTERED. 10/09/2007)

114 10/05/2007 MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FRCP DOCUMENT FILED BY L ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) RETURN DATE SET FOR 12/3/2007 AT 10.00 AM.(JAR) (ENTERED: 10/09/2007)

113 10/02/2007 ORDER· IT IS HEREBY ORDERED THAT EISNER SHALL CONTACT MAGISTRATE JUDGE ELLIS NO LATER

THAN OCTOBER 5, 2007 TO JOIN IN SETTLEMENT DISCUSSIONS UNDER HIS SUPERVISION IT IS FURTHER ORDERED THAT SHOULD EISNER DESIRE TO BRING A SUMMARY JUDGMENT MOTION BEYOND THE MARCH 30, 2007 DATE, HE MUST BY 10/8/07 SUBMIT A LETTER TO THE COURT THE FAILURE TO MOVE FOR SUMMARY JUDGMENT PRIOR TO MARCH 30 SHOULD BE EXCUSED. IT IS FURTHER ORDERED THAT SHOULD ANY REQUEST TO FILE LATE SUMMARY JUDGMENT MOTION BE GRANTED, EISNER MUST FILE AND SERVE HIS MOTION FOR SUMMARY JUDGMENT NO LATER THAN OCTOBER 19, 2007. IF EISNER FILES A MOTION FOR SUMMARY JUDGMENT, THE PLAINTIFF MAY FILE A CONSOLIDATED OPPOSITION TO BATTERMAN'S AND EISNER'S MOTIONS FOR SUMMARY JUDGMENT NO LATER THAN 11/16/07 IF EISNER DOES NOT FILE A MOTION FOR SUMMARY JUDGMENT, THE SCHEDULE SET BY THE ORDER OF SEPTEMBER 24, 2007 WILL REMAIN IN EFFECT SO ORDERED. REPLIES WOULD BE DUE BY 12/7/07. SO ORDERED. (SIGNED BY JUDGE DENISE L COTE ON 10/2/07) (JS) (ENTERED. 10/02/2007)

112 09/24/2007 ORDER: THAT BATTERMAN MAY FILE A MOTION FOR SUMMARY JUDGMENT NO LATER THAN 10/5/07. THE PLAINTIFF'S OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT IS DUE NO LATER THAN 11/2/07 BATTERMAN'S REPLY, IF ANY, IS DUE NO

LATER THAN 11/16/07 NO FURTHER EXTENSIONS WILL BE GRANTED FOR BATTERMAN. MOTIONS DUE BY 10/5/2007. REPLIES DUE BY 11/16/2007. RESPONSES DUE BY 11/2/2007 (SIGNED BY JUDGE DENISE L COTE ON 9/24/07) COPIES MAILED BY CHAMBERS (DB) (ENTERED 09/25/2007)

111 09/14/2007 ORDER THAT BATTERMAN'S REQUEST FOR A SECOND OPPORTUNITY TO BRING A SUMMARY JUDGMENT MOTION IS DENIED THAT ANY ADDITIONAL REQUEST BY BATTERMAN FOR THIS RELIEF MUST BE MADE NO LATER THAN 9/21/07, AND MUST BE PROPERLY SUPPORTED (SIGNED BY JUDGE DENISE L COTE ON 9/13/07) COPIES SENT BY CHAMBERS (CD) (ENTERED. 09/17/2007)

110 09/13/2007 ORDER BATTERMAN'S REQUEST FOR A SECOND OPPORTUNITY TO BRING A SUMMARY JUDGMENT MOTION IS DENIED. ANY ADDITIONAL REQUEST BY BATTERMAN FOR THIS RELIEF MUST BE MADE NO LATER THAN SEPTEMBER 21, 2007, AND MUST BE PROPERLY SUPPORTED SO ORDERED (SIGNED BY JUDGE DENISE L. COTE ON 9/13/07) (JCO) (ENTERED 09/14/2007)

105 08/24/2007 OPINION AND ORDER #95104 THE SEMINARY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED THE ONLY REMAINING CLAIMS IN THIS CASE ARE THE SECTION 1981 AND

NYSHRL SECTION 296 CLAIMS AGAINST BATTERMAN, WHO HAS NOT MOVED FOR SUMMARY JUDGMENT (SIGNED BY JUDGE DENISE L COTE ON 8/24/07); COPIES FORWARDED BY CHAMBERS (DJC) MODIFIED ON 8/28/2007 (KCO) (ENTERED 08/27/2007)

104 06/28/2007 ANSWER TO AMENDED COMPLAINT DOCUMENT FILED BY L ROBERT BATTERMAN (AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) RELATED DOCUMENT. 51 AMENDED COMPLAINT,,, FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D .(DLE) (ENTERED. 07/03/2007)

102 05/18/2007 OBJECTIONS TO FILING OPPOSITION PAPERS TO THE MOTION OF DEFTS FOR SUMMARY JUDGMENT. DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD (CD) (ENTERED: 05/29/2007)

97 03/30/2007 NOTICE TO PRO SE LITIGANT OPPOSING MOTION FOR SUMMARY JUDGEMENT (ATTACHED TO THIS DOCUMENT IS RULE 56.1, SEMINARY DEFENDANTS' STATEMENT OF MATERIAL FACTS, MEMORANDUM OF LAW IN SUPPORT OF SEMINARY DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT, AND THE DECLARATION OF JOSEPH C HOUGH, JR. IN SUPPORT) DOCUMENT FILED BY EUAN K CAMERON(INDIVIDUALLY), DAVID M CARR, ANA MARIA DIAZ-STEVENS,

CHRISTOPHER L MORSE, ANN B. ULANOV, JOHN A. MCGUCKIN, JANET WALTON, JOSEPH C HOUGH, JR(AS PRESIDENT OF UNION THEOLOGICAL SEMINARY), EUAN K CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY) (MBE) (ENTERED 04/04/2007)

96 02/21/2007 ANSWER TO AMENDED COMPLAINT. DOCUMENT FILED BY ANA MARIA DIAZ-STEVENS RELATED DOCUMENT: 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D. (JAR) (ENTERED. 02/27/2007)

95 02/21/2007 ANSWER TO AMENDED COMPLAINT DOCUMENT FILED BY DAVID M CARR RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D (JAR) (ENTERED. 02/27/2007)

94 02/21/2007 ANSWER TO AMENDED COMPLAINT DOCUMENT FILED BY ANN B ULANOV RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D. (JAR) (ENTERED: 02/27/2007

93 02/21/2007 ANSWER TO AMENDED COMPLAINT. DOCUMENT FILED BY CHRISTOPHER L MORSE RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH.D. (JAR)

(ENTERED 02/27/2007)

92 02/21/2007 ANSWER TO AMENDED COMPLAINT DOCUMENT FILED BY JANET WALTON. RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH.D (JAR) (ENTERED. 02/27/2007)

91 02/21/2007 ANSWER TO AMENDED COMPLAINT. DOCUMENT FILED BY JOHN A MCGUCKIN RELATED DOCUMENT: 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D..(JAR) (ENTERED· 02/27/2007)

90 02/21/2007 ANSWER TO AMENDED COMPLAINT. DOCUMENT FILED BY EUAN K CAMERON(INDIVIDUALLY), EUAN K CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY) RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D (JAR) (ENTERED 02/27/2007)

89 02/21/2007 ANSWER TO AMENDED COMPLAINT DOCUMENT FILED BY JOSEPH C HOUGH, JR (AS PRESIDENT OF UNION THEOLOGICAL SEMINARY), JOSEPH C HOUGH, JR(INDIVIDUALLY). RELATED DOCUMENT 51 AMENDED COMPLAINT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH.D (JAR) (ENTERED 02/27/2007)

79 12/06/2006 MEMORANDUM AND OPINION # 94008 THE MOTION TO DISMISS THE SECOND AMENDED COMPLAINT IS GRANTED WITH RESPECT TO DFTS MALONEY, ZUHUSKY, DESPATCH, AND BALMER. IT IS OTHERWISE DENIED. (SIGNED BY JUDGE DENISE L. COTE ON 12/5/06) (DLE,) (ENTERED. 12/07/2006)

78 12/06/2006 ORDER. THAT THE CLAIM AGAINST BATTERMAN AND FULLERTON PLEADED UNDER 42 USC 1985 IS DISMISSED FOR THE REASONS CITED IN THE FEBRUARY 7 OPINION; THE MOTION BY FULLERTON TO DISMISS THE CLAIM UNDER NEW YORK STATE HUMAN RIGHTS LAW 296(6) IS GRANTED FOR FAILURE TO STATE A CLAIM AGAINST HIM. ALL CLAIMS AGAINST FULLERTON HAVING BEEN DISMISSED, THE ACTION AGAINST HIM IS DISMISSED THE MOTION TO DISMISS THE CLAIM AGAINST BATTERMAN UNDER NEW YORK STATE HUMAN RIGHTS LAW 296(6) IS DENIED DECISION IS RESERVED ON BATTERMAN'S MOTION TO DISMISS THE CLAIM UNDER 42 USC 1981 THE MOTION MAY BE RENEWED IN THE CONTEXT OF SUMMARY JUDGMENT PRACTICE (SIGNED BY JUDGE DENISE L COTE ON 12/5/06) (DLE,) (ENTERED 12/07/2006)

77 12/06/2006 ORDER RE. 56 MOTION TO DISMISS FILED BY DAVID FRAZER, THAT THIS ACTION IS DISMISSED AS TO DFT. DAVID E. FRAZER (SIGNED BY JUDGE DENISE L. COTE ON 12/5/06) (PL,)

(ENTERED 12/07/2006)

76 10/02/2006 OPPOSITION RE 58 MOTION TO DISMISS., 56 MOTION TO DISMISS , 55 MOTION TO DISMISS . DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD. (DLE,) (ENTERED 10/04/2006)

75 10/02/2006 REPLY MEMORANDUM OF LAW IN SUPPORT RE· 30 MOTION TO DISMISS DOCUMENT FILED BY DAVID FRAZER(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) (DLE,) (ENTERED: 10/04/2006)

74 09/28/2006 REPLY IN FURTHER SUPPORT RE 58 MOTION TO DISMISS DOCUMENT FILED BY HOLLAND L HENDRIX(AS PRESIDENT (EMERITUS) OF UNION THEOLOGICAL SEMINARY), ROSEMARY S. KELLER(AS ACADEMIC DEAN (EMERITA)), THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, DESPATCH MOVING AND STORAGE COMPANY, INC , L ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), JOHN F. FULLERTON, ANDREW SQUIRE, EUGENE G EISNER, UNION THEOLOGICAL SEMINARY, JOSEPH C HOUGH, JR(AS PRESIDENT OF UNION THEOLOGICAL SEMINARY), MARY E. MACNAMARA(AS VICE-PRESIDENT OF UNION THEOLOGICAL SEMINARY), EUAN K. CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY). (JAR,) (ENTERED 10/02/2006)

73 09/28/2006 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT RE: 58 MOTION TO DISMISS DOCUMENT FILED BY L. ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), JOHN F FULLERTON. (JAR,) (ENTERED 10/02/2006)

72 09/15/2006 MEMORANDUM OF LAW IN OPPOSITION RE. 58 MOTION TO DISMISS , 56 MOTION TO DISMISS., 55 MOTION TO DISMISS. DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD. (DB,) (ENTERED. 09/20/2006)

62 07/05/2006 ANSWER TO SECOND AMENDED VERIFIED COMPLAINT DOCUMENT FILED BY EUGENE G EISNER.(RW,) (ENTERED: 07/06/2006)

61 06/23/2006 AMENDED CERTIFICATE OF SERVICE OF MOTION TO DISMISS AND SUPPORTING DOCUMENTS SERVED ON PLAINTIFF ON 6/16/06 SERVICE WAS ACCEPTED BY FEDERAL EXPRESS MAIL DOCUMENT FILED BY EUAN K CAMERON(INDIVIDUALLY), DESPATCH MOVING AND STORAGE COMPANY, INC , RANDALL H. BALMER, JOHN A. MCGUCKIN, JANET WALTON, NICK ZUHUSKY, JOSEPH C HOUGH, JR(AS PRESIDENT OF UNION THEOLOGICAL SEMINARY), JOSEPH C HOUGH, JR(INDIVIDUALLY), EUAN K. CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY) (DB,)

(ENTERED· 06/29/2006)

60 06/21/2006 AFFIDAVIT OF SERVICE OF NOTICE OF MOTION AND MEMO OF LAW IN SUPPORT SERVED ON DAVEID E FRAZER, ESQ ; EUGENE G EISNER, ESQ ON 6/21/2006 SERVICE WAS ACCEPTED BY SAID LAW OFFICES. DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD (JAR,) (ENTERED: 06/21/2006)

59 06/16/2006 MEMORANDUM OF LAW IN SUPPORT RE· 58 MOTION TO DISMISS . DOCUMENT FILED BY L. ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), JOHN F FULLERTON. (DJC,) (ENTERED. 06/2 l/2006)

58 06/16/2006 MOTION TO DISMISS DOCUMENT FILED BY L. ROBERT BATTERMAN (AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), JOHN F FULLERTON (DJC,) (ENTERED: 06/21/2006)

57 06/16/2006 MEMORANDUM OF LAW IN SUPPORT RE 56 MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND GRANTING COSTS AND SUCH OTHER AND FURTHER RELIEF TO THE DEFENDANTS AS THE COURT MAY DEEM JUST. DOCUMENT FILED BY DAVID FRAZER(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) (RECEIVED IN THE NIGHT DEPOSIT BOX ON 6/16/2006 AT 7 15PM) (JAR,) MODIFIED ON 6/19/2006 (JAR,)

(ENTERED 06/19/2006)

56 06/16/2006 MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND GRANTING COSTS AND SUCH OTHER AND FURTHER RELIEF TO THE DEFENDANTS AS THE COURT MAY DEEM JUST DOCUMENT FILED BY DAVID FRAZER(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) (RECEIVED IN THE NIGHT DEPOSIT BOX ON 6/16/2006 AT 7 14PM) (JAR,) (ENTERED 06/19/2006)

55 06/16/2006 MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED AND VERIFIED COMPLAINT. (JMI,) (ENTERED 06/16/2006)

53 05/24/2006 CERTIFICATE OF SERVICE OF SUMMONS AND AMENDED COMPLAINT. DAVID M. CARR SERVED ON 5/5/2006, ANSWER DUE 5/25/2006, DIAZ-STEVENS SERVED ON 5/5/2006, ANSWER DUE 5/25/2006, MICHAEL MALONEY SERVED ON 5/5/2006, ANSWER DUE 5/25/2006, CHRISTOPHER L MORSE SERVED ON 5/5/2006, ANSWER DUE 5/25/2006; ANN B. ULANOV SERVED ON 5/5/2006, ANSWER DUE 5/25/2006. SERVICE WAS ACCEPTED BY MR. BIENVENIDO CHUCK GONZALES, COMPTROLLER OF UNION THEOLOGICAL SEMINARY. SERVICE WAS ALSO MADE BY MAIL DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD. (JAR,) (ENTERED· 05/26/2006)

52 05/24/2006 CERTIFICATE OF SERVICE OF SUMMONS AND AMENDED COMPLAINT EUGENE G EISNER SERVED ON 5/22/2006, ANSWER DUE 6/12/2006. SERVICE WAS ACCEPTED BY MR. GRAHAM MULREADY. SERVICE WAS ALSO MADE BY MAIL DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD (JAR,) (ENTERED 05/26/2006)

51 05/05/2006 AMENDED COMPLAINT AMENDING 5 AMENDED COMPLAINT, AGAINST L. ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), DAVID M. CARR, DIAZ-STEVENS, DAVID FRAZER(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR), JOHN F. FULLERTON, MICHAEL MALONEY, CHRISTOPHER L MORSE, ANN B ULANOV, EUAN K CAMERON(INDIVIDUALLY). DESPATCH MOVING AND STORAGE COMPANY, INC., EUGENE G. EISNER, RANDALL H BALMER, JOHN A. MCGUCKIN, JANET WALTON, NICK ZUHUSKY, JOSEPH C HOUGH, JR(AS PRESIDENT OF UNION THEOLOGICAL SEMINARY), JOSEPH C HOUGH, JR(INDIVIDUALLY), EUAN K CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY) DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD. RELATED DOCUMENT. 5 AMENDED COMPLAINT, FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PH D (DLE,) (ENTERED 05/09/2006) 04/21/2006 SET ANSWER DUE DATE PURS. TO 51

AMENDED COMPLAINT,,, AS TO EUAN K CAMERON(INDIVIDUALLY) ANSWER DUE ON 6/16/2006, DESPATCH MOVING AND STORAGE COMPANY, INC ANSWER DUE ON 6/16/2006, L ROBERT BATTERMAN(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) ANSWER DUE ON 6/16/2006; DAVID M. CARR ANSWER DUE ON 6/16/2006, DIAZ-STEVENS ANSWER DUE ON 6/16/2006. DAVID FRAZER(AS AN INDIVIDUAL AND AS A CO CONSPIRATOR) ANSWER DUE ON 6/16/2006, JOHN F FULLERTON ANSWER DUE ON 6/16/2006; MICHAEL MALONEY ANSWER DUE ON 6/16/2006, CHRISTOPHER L. MORSE ANSWER DUE ON 6/16/2006, ANN B. ULANOV ANSWER DUE ON 6/16/2006; EUGENE G EISNER ANSWER DUE ON 6/16/2006; RANDALL H BALMER ANSWER DUE ON 6/16/2006, JANET WALTON ANSWER DUE ON 6/16/2006; NICK ZUHUSKY ANSWER DUE ON 6/16/2006, JOSEPH C HOUGH, JR(AS PRESIDENT OF UNION THEOLOGICAL SEMINARY) ANSWER DUE ON 6/16/2006; JOSEPH C. HOUGH, JR(INDIVIDUALLY) ANSWER DUE ON 6/16/2006, EUAN K. CAMERON(AS ACADEMIC DEAN OF UNION THEOLOGICAL SEMINARY) ANSWER DUE ON 6/16/2006. (SAC,) (ENTERED: 05/26/2006)

50 04/21/2006 ORDER. THAT PLNTF MAY FILE A SINGLE COMPLAINT INCORPORATING HIS CHARGES AGAINST ALL DEFTS NO LATER THAN 5/5, DEFTS SHALL RESPOND TO THE COMPLAINT BY 6/16 IF THE

RESPONSE IS IN THE FORM OF A MOTION, PLNTF SHALL SUBMIT HIS OPPOSITION BY 7/14. DEFT SHALL SUMBIT ANY REPLY BY 7/28 COURTESY COPIES TO BE PROVIDED TO CHAMBERS BY SENDING THEM TO THE PRO SE OFFICE, ROOM 230. (SIGNED BY JUDGE DENISE L. COTE ON 4/20/06) COPIES SENT BY CHAMBERS.(CD,) (ENTERED: 04/24/2006)

49 04/14/2006 MOTION FOR LEAVE TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINTS ON NEW PARTIES AND ON PARTIES PREVIOUSLY DISMISSED, PURSUANT TO FRCP 12(B)(6) DOCUMENT FILED BY MICHAEL WESLEY FRIERSON-HARRIS, PHD (DB,) (ENTERED: 04/19/2006)

47 03/21/2006 PRETRIAL SCHEDULING ORDER IN PRO SE ACTION AMENDED PLEADINGS DUE BY 4/14/2006. JOINDER OF PARTIES DUE BY 4/14/2006 PRETRIAL MOTIONS DUE BY 3/30/2007 RESPONSES DUE BY 4/27/2007 REPLIES DUE BY 5/11/2007 EXPERT DISCOVERY DUE BY 2/23/2007 (SIGNED BY JUDGE DENISE L COTE ON 3/21/2006) COPIES MAILED BY CHAMBERS (LB,) (ENTERED 03/22/2006)

Appendix H – Second Circuit Form C, Addendum

FORM C – ADDENDUM B ISSUES PROPOSED TO BE RAISED ON APPEAL and STANDARD OF REVIEW FOR EACH PROPOSED ISSUE

(Supplemental filing of Form C – Addendum B. Previous filing of Form C along with Addendum A on 1 February 2008.)

I Federal Rules of Civil Procedure ("F.R.C P ") Rule 12 (b) (6) Dismissals of L Robert Batterman, Esq , John F Fullerton, III, Esq , David E Frazer, Esq , Despatch Moving and Storage Co., Inc , Nick Zuhusky, President, Despatch Moving and Storage Co , Inc., and Michael Maloney

Standard of Review *de novo* FN1

FN1. *Bernheim v. Litt*, 79 F. 3d 318, at 321 (C.A 2, 1995), citation omitted Since the 5 December 2006 dismissal orders, a new "plausibility standard" may have emerged for dismissing 42 U S C §1985 type complaints See *Bell Atlantic Corp v. Twombly*, 127 S Ct. 1955 (U S., 2007) as interpreted by *Iqbal v Hasty*, 490 F 3d 143 (C A 2, 2007), noting the Supreme Court's "rejection of the 'no set of facts'" standard in Conley v. Gibson (citation omitted, Bell, FN 7): "After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a

> flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible " (*Iqbal*, at 157-158)

Appealed orders: 7 February 2006; 17 March 2006, 21 March 2006 (Bench Order); 5 December 2006 (5 orders).

Issue on Appeal #1: Should any one of employer's agents–regardless of the nature of any agent's agency, e g , legal or otherwise–have been dismissed from Frierson-Harris v Hough, et al , pursuant to the Federal Rules of Civil Procedure ("F R C P.") Rule 12 (b) (6), if the agent alone or in a conspiracy with other agents–each acting beyond the scope of her/his agency–not only had foreknowledge of the discriminatory involuntary modification of the black employee's employment contracts–including the seizure, conversion, and destruction of that employee's personalty in furtherance of the discriminatory modification of the employment contracts–but also used her/his agency to abet such discrimination?

Issue on Appeal #2: If attorneys–whether representing employer or employee–have foreknowledge of the intentional discrimination that is actionable under 42 U S C §1981 and foreknowledge of the deprivation of rights with intention to discriminate racially that is actionable under §1985, and if those attorneys not only fail to act within the scope of their representation to forestall such discrimination, but, by failing to so forestall such discrimination, appear knowingly to encourage and advise such discrimination, should the court have dismissed them from Frierson-Harris v

Hough, et al., pursuant to F.R C.P. 12 (b) (6)?

Issue on Appeal #3 If the Court finds that New York attorneys aided and abetted intentional discrimination of the sort that is actionable under 42 U S C. §1981 or if the Court finds that those attorneys joined as well as aided and abetted a conspiracy that is actionable under 42 U S.C. §1985 to deprive a black employee of property rights, is the Court permitted to certify–pursuant to 22 N Y C R R. 1200.3–those findings as part of the requested relief in Frierson-Harris v Hough, et al for appropriate professional action against the same attorneys?

II. F R.C P Rule 56 Grant of Summary Judgment[,] Interpretation of F.R C.P. 8 (b) (6) and Exclusion of Incontrovertible Admissions

Standard of Review: *de novo* [FN2] and manifest error.[FN3]

Appealed Orders 27 December 2006, 24 August 2007, 21 December 2007, 26 December 2007

Issue on Appeal #4: Did the Court abuse its discretion by adhering to the scheduling order of 21 March 2006, based on the first verified and amended complaint, even after it permitted the second verified and amended complaint and the joinder of parties thereby after 14 April 2006?

Issue on Appeal #5 Are admissions entered into the record by failure to deny allegations in a complaint (verified allegations, in this instance), pursuant to F R.C P 8 (b) (6), incontrovertible?

Issue on Appeal #6 Is a Court permitted to admit a Local Rule 56 1 statement and the evidence in support thereof, if such a statement is a denial of an admission on record?

> "[FN2] " the interpretation of a procedural rule is reviewed de novo " (Citation omitted, *Tancredi v. Metropolitan Life Insurance Co* , 378 F 3d 220, at 226 [C.A 2, 2004])
>
> [FN3] The district court has broad discretion in choosing whether to admit evidence [Citations omitted] . Accordingly, we review a district court's evidentiary rulings for manifest error

[Citations omitted.] (*Raskin v The Wyatt Company*, 125 F.3d 55, at 65-66 [C A. 2, 1997].)

. . The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment 'shall set forth such facts as would be admissible in evidence.' Fed R Civ P 56(e) (emphasis added)." (*Id.*, at 66)

III F.R C P Rule 56 Grants of Summary Judgmentin favor of Joseph C Hough, Ph D , L Robert Batterman, Esq., Eugene Eisner, Esq , Euan K Cameron, Ph.D , David M Carr, Ph.d, Ana Maria Diaz-Stevens, Ph D , John A. McGuckin, Ph D., Christoper L Morse. Ph D , Ann B Ulanov, Ph D , and Janet R Walton, Ed D

Standard of Review: *de novo.*[FN4]

> [FN4]"In reviewing a district court's decision to grant summary judgment, our initial task is to determine whether the court below properly held that there were no genuine issues of material fact for trial. [Citation omitted.] Examining the evidence in the light most favorable to the non-moving party, we are to "apply a de novo standard of review to ensure that the substantive law was correctly applied. [Citations omitted]" (Adjustrite Systems, Inc v GAB Business Services, Inc., 145 F.3d 543, at 547 (C.A 2, 1998)

Appealed Orders: 7 May 2006, 24 August 2007; 31 August 2007; 2 October 2007, 9 October 2007; 21 December 2007, and 26 December 2007.

Issue on Appeal #7 Did the Court abuse its discretion by refusing to admit Plaintiff's verified complaint as Plaintiff's required refutation of Defendants' Local Rule 56.1 statements, especially given the inadmissibility of the attempted denials of admissions in the record preceding those Local Rule 56 1 statements?

Issue on Appeal #8 Could Plaintiff have failed to make a *prima facia* case of discrimination and thus have failed to withstand Defendants' motions for summary judgment if Defendants admitted all of the well-pleaded factual allegations in the second verified and amended complaint?

Appendix I - Addendum to Objections to Summary Judgment

UNITED STATES DISTRICT COURT in the SOUTHERN DISTRICT OF NEW YORK

Michael Wesley Frierson-Harris, Ph.D , a/k/a Michael Wesley Harris, Ph D ,

Plaintiff,

v.

Joseph C. Hough, Jr , Ph D , L Robert Batterman, Esq , Eugene Eisner, Esq., Euan K Cameron, Ph D , David M Carr, Ph. D , Ana Maria Diaz-Stevens, Ph D., John A. McGuckin, Ph.D , Christopher L Morse, Ph D., Ann B Ulanov, Ph D , Janet R. Walton, Ed. D ,

Defendants

No 05 CV 3077 (Cote, J)

PLAINTIFF'S OBJECTIONS TO FILING OPPOSITION PAPERS TO THE MOTION OF DEFENDANTS HOUGH, CAMERON, CARR,

DIAZ-STEVENS, McGUCKIN, MORSE, ULANOV, AND WALTON FOR SUMMARY JUDGMENT OF THE CLAIMS AGAINST THOSE DEFENDANTS IN THE SECOND AMENDED COMPLAINT.

ADDENDUM FILED IN RESPONSE TO

1) Motion for Summary Judgment for Defendant L. Robert Batterman, Esq.

2) Motion for Summary Judgment for Defendant Eugene G Eisner, Esq

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A Each Defendant's failure to answer the factual allegations of the "Second Verified and Amended Complaint and Jury Demand" constitutes each Defendant's admissions of those allegations.

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B Defendants' admissions are incontrovertible for the duration of this case

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C. Without an evidentiary ruling on Defendants' inadmissible denials of their admissions, Plaintiff is extremely prejudiced by the reply mandates of Local Rules 56 1 and 56.2.

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D Defendants' 56 1 statements fail to meet the evidentiary mandate of Local Rule 56 1 (d).

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Preliminary Statement.

On 9 October 2007, this Court ordered Plaintiff to file opposition to motions for summary judgment submitted by Defendants L Robert Batterman, Esq., and Eugene G. Eisner, Esq. The 9 October order extended time for motions for summary judgment to be filed and served pursuant to the Court's scheduling order in this case, entered 21 March 2006 This responsive filing, "Plaintiff's Objections to Filing Opposition Papers To the Motion of DefendantsHough, Cameron, Carr, Diaz-stevens, Mcguckin, Morse, Ulanov, and Walton for Summary Judgment of the Claims Against Those Defendants in the Second Amended Complaint" ("Objections to Summary Judgment") was filed pursuant to the same scheduling order on 7 May 2007. (A true and accurate copy of Objections to Summary Judgment is attached hereto as "Exhibit A ") Plaintiff, herewith, re-submits Objections to Summary Judgment along with this "Addendum Filed in Response to 1) Motion for Summary Judgment for Defendant L. Robert Batterman, Esq 2) Motion for Summary Judgment for Defendant Eugene G. Eisner, Esq " ("Objections Addendum"), incorporated into it, in compliance with the 21 March 2006 and 9 October 2007 orders.

A. **Each Defendant's failure to answer the factual allegations of the "Second Verified and Amended Complaint and Jury Demand" constitutes each Defendant's admissions of those allegations.**

All Defendants have admitted all factual allegations in the "Second Verified and Amended Complaint and Jury Demand" ("SAC"), as it was filed and served on 5 May 2006 (An accurate and true copy of the verified SAC is attached hereto as "Exhibit 2 ") Those admissions became a matter of record for all Defendants, but Eugene Eisner, Esq ("Eisner"), ten days following the Court's denials of motions to dismiss pursuant to Federal Rules of Civil Procedure ("FRCP") 12 (b) on 6 December 2006 [FN1] Eisner's admissions became a matter of record as of 16 June 2006, by which time he had failed to file and serve an answer to the SAC as ordered by the Court.[FN2]

[FN1] The Defendants who were denied dismissal and from whom an answer was due within ten days are Joseph C Hough, Jr. ("President"), Euan K Cameron ("Dean 2"), L Robert Batterman ("Batterman"), David M. Carr ("Carr"), Ana Maria Diaz-Stevens ("Diaz-Stevens"), John A McGuckin ("McGuckin"), Christopher L Morse ("Morse"), Ann B. Ulanov ("Ulanov"), Janet R. Walton ("Walton") Their answers were due in ten days pursuant to FRCP 12 (a) (4) (A), following the Court's 6 December 2006 denials of their FRCP 12 motions to dismiss: "Unless a different time is fixed by court order, the service of a motion permitted under

this rule alters these periods of time as follows (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action . . "

[FN2] On 20 April 2006, the Court ordered all Defendants to respond to the SAC–via motion for dismissal or via answer–by 16 June 2006. ("Order," 20 April 2006) Eisner never moved for dismissal

Defendants' failures to answer the factual allegations in the SAC constitute their admissions of those allegations under two Rules FRCP 7 (a) – 'There shall be a complaint and an answer . . "; and 2) FRCP 8 (d), "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading "

In the Second Circuit, both rules are observed strictly· "Courts in this Circuit generally take a strict view of Rule 8(b) requirements and Rule 8(d) consequences, even when the result is admission of claim elements " (*D. Scherer v. The Equitable Life Assurance Society of the United States*, 2004 WL 2101932 at 12 [S.D N.Y , 2004], citations omitted.) "A responsive pleading (an answer) is required to a complaint " (*LeBoeuf, Lamb, Greene & MacRae, L.L P v Worsham*, 185 F 3d 61, at 66 [C.A 2,1999])

B. **Defendants' admissions are incontrovertible for the duration of this case.**

Defendants' admissions " establish matters of fact so conclusively as to remove them from the area of controversy in [this] case. Proof of the existence of matters thus established is neither necessary nor appropriate, *and evidence of their nonexistence is inadmissible"* (emphasis added) (Treatise· Graham, *Handbook of Federal Evidence*, §201 9 [6th ed. 2006].) Indeed, " . . [a]n allegation in a pleading which is expressly admitted in an opposing pleading *or which is not denied* is conclusively established for purposes of the case [Footnote citing FRCP 8 (d) omitted]" (emphasis added) (*Id*)

Since Defendants crafted their 56 1 statement specifically to deny their admissions on record previous to their 56 1 statements, Defendants' 56 1 statements are invalid There are three 56.1 statements on record 1) the combined 30 March 2007 56.1 statement of President, Dean 2, Carr, Diaz-Stevens, McGuckin, Morse, Ulanov, and Walton, and 2) the 4 October 2007 56 1 statement of Batterman (including his re-submission of President's 28 March 2006 affidavit as well as President's 4 October 2007 affidavit), and 3) the 19 October 2007 56.1 statement of Eisner Each statement consists entirely of denials of previous admissions of each Defendant. The facts on which each Defendant purports to build her/his 56.1 statement are 'facts' which, pursuant to F.R C P. 8 (d), can not be proffered as 'indisputable' facts in this case That is, those purportedly 'indisputable' facts controvert the incontrovertible admissions of each Defendant–admissions of facts, indeed, "conclusively established for the purposes of the case."Federal Rules of Civil Procedure Rule 12 (b)[FN3]

[FN3] The 28 March 2007 "Expert Report of Frank L Kurre on Behalf of Defendant [sic.]" and all evidence in support of it are likewise inadmissible and should be ruled as such Not only are the report and supporting evidence late, according to the 26 March 2006 scheduling order. But the report and evidence are submitted in support of affirmative defenses that do not appear in the record. Because Defendants have failed to answer, their assertion of the affirmative defense which expert Kurre purports to address is absent from the record and is thus inadmissible: "*Every defense, in law or fact,* to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, *shall be asserted in the responsive pleading thereto if one is required,* except that the following defenses may at the option of the pleader be made by motion. (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19" (emphasis added) (FRCP, 12 (b))

C. Without an evidentiary ruling on Defendants' inadmissible denials of their admissions, Plaintiff is extremely prejudiced by the reply mandates of Local Rules 56.1 and 56.2.

Local Rules 56 1/ 2 and the un-denied factual allegations in the SAC ("FRCP-8d admissions") are mutually exclusive On the one hand, Local Rule 56 1 (c) states, in pertinent part, "*Each numbered paragraph in the statement* of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted *for purposes of the motion* unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" (emphasis in original) (Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, at 42-43 [Effective April 15, 1997, Includes Amendments through April 15, 2005]) And, on the same hand, Local Rule 56.2 states, in pertinent part, " . Rule 56 provides that you may NOT [caps in original] oppose summary judgment simply by relying upon the allegations in your complaint " (Id , at 44)

On the other hand, the only 'indisputable' facts "for the purposes of the case" at this time are the FRCP-8d admissions. Those facts can be found only in the SAC. Local Rule 56 2's stricture against "relying upon the allegations in [the SAC]" requires Plaintiff to submit additional proof of FRCP-8d admissions, 56.2 mandates, in other words, that Plaintiff controvert the incontrovertible

The mandate requiring Plaintiff to deny FRCP-8d admissions has been subverted by Defendants to force Plaintiff to defend inadmissible evidence which Defendants themselves impermissibly entered into the record under the guise of 56.1 statements. The FRCP-8d admissions are incontrovertible; evidence

controverting FRCP-8d admissions is, therefore, inadmissible In short, Defendants resort to curative admissibility–under color of rules 56 1/.2f their inadmissible denials of their FRCP-8d admissions "A party is not allowed to introduce inadmissible evidence in order to explain other inadmissible evidence that it, rather than its adversary, has introduced " (*United States v Rosa*, 11 F 3d 315, at 335 [C A 2, 1993].)

D Defendants' 56.1 statements fail to meet the evidentiary mandate of Local Rule 56.1 (d).

Defendants ask the Court to grant summary judgment on the basis of their 56 1 statements–in particular on the basis of Plaintiff's failure to answer those statements But their 56.1 statements fail to comply with the fundamental evidentiary requirements of Local Rule 56.1 (part d): "Each statement by the movant or opponent pursuant to Rule 56 1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)" (emphasis supplied). (Local Rules, at 43) Defendants seem to think that their inadmissible denials of their FRCP-8d admissions become admissible denials once they assert their FRCP-8d admissions into 56 1 paragraphs. In turn, Defendants believe their statements must be controverted by Plaintiff or, pursuant to Local Rule 56 1 (c), their FRCP-8d admissions will become true.

At first blush, Defendants' thinking appears logical.

First, their FRCP-8d admissions would seem to become truth, absent *Plaintiff's* (rather than *Defendants'*) denials Second, rule 56 1 would seem to require a specific denial of their FRCP-8d " . *[e]ach numbered paragraph in the statement of* material facts set forth in the statement required to be served by the moving party will be deemed to be admitted *for purposes of the motion* unless *specifically* controverted by a *correspondingly numbered paragraph* in the statement required to be served by the opposing party" (emphasis in original). (Local Rules, at 43) On closer examination, however, Defendants' thinking denies Second Circuit law " . allegations of uncontested fact cannot be deemed true simply by virtue of their assertion in a Local Rule 56.1 statement " (*Holz v. Rockefeller & Co., Inc* , 258 F 3d 62, at 74 [C.A 2, 2001], citations omitted)

The Court has before it two competing sets of admissions 1) Defendants' FRCP-8d admissions for failure to deny allegations in the verified SAC; and 2) Plaintiff's purported admissions for failure to deny Defendants' 56 1 denials of their FRCP-8d admissions The former are creatures of Defendants' disregard of rules of federal civil procedure and federal rules of evidence. The latter are the consequences of that disregard One Court has analogized Defendants' disregard with fitting bluntness· "Allowing a Local Rule 56.1 statement to substitute for the admissibility requirement set forth in Fed. R Civ P 56(e) 'would be tantamount to the tail wagging the dog.'" (*Holz*, 258 F 3d, at 74, citation omitted.) Until the Court makes an evidentiary ruling as to the validity of the former or the validity of the latter set--literally, until the

Court holds which set wags the dog–summary judgment can not proceed

Pursuant to Rule 11·

_____[signature]_____

Michael Wesley Frierson-Harris, Plaintiff, pro se
301 Cathedral Parkway, Apt. 6E
New York, NY 10026
917 331 1894
866.383.3904 (fax)